IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

YOLANDA GARNETT,	)	
	)	
Plaintiff,	)	C.A. No. 03C-10-006 (MJB)
	)	
v.	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE, PROGRESSIVE CASUALTY INSURANCE COMPANY,	)	
	)	
Defendants.	)	

Submitted: November 30, 2006

Decided: January 30, 2007

Upon Defendant's Motion in Limine **DENIED**.

OPINION AND ORDER

Gary S. Nitsche, Esquire, W. Christopher Componovo, Esquire, Weik, Nitsche, Dougherty & Componovo, Wilmington, Delaware, Attorneys for Plaintiff.

Brian E. Lutness, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware, Attorney for Defendant, Progressive Casualty Ins. Co.

Maria J. Poehner, Esquire, Chrissinger & Baumberger, Wilmington, Delaware, Attorney for Defendant, Liberty Mutual Fire Ins. Co.

BRADY, J.

INTRODUCTION

This is an insurance coverage case arising from an injured Plaintiff's claims for underinsured motorist ("UIM") benefits. Pending before the Court is a Motion in Limine seeking a determination as to which insurance policy has the obligation to provide primary coverage for Plaintiff's UIM benefits. The issue before the Court is a matter of first impression - whether the well-settled rule that a vehicle's insurer is the primary UIM carrier applies where the UIM coverage was triggered by a policy other than the vehicle's insurance policy. For the reasons stated herein, the Court finds Progressive Casualty Insurance Company ("Progressive"), the insurer of the vehicle, is the primary carrier, while Liberty Mutual Fire Insurance ("Liberty"), the insurer of the Plaintiff, is the excess carrier.

FACTUAL BACKGROUND

The Complaint alleges that on January 25, 2002, while driving a vehicle owned by her uncle, Richard Garnett, Plaintiff, Yolanda Garnett, was involved in an automobile collision with a vehicle driven by Taylor Nneka. Ms. Nneka carried liability insurance with limits of $15,000 per person/ $30,000 per accident, which was tendered, in full, to Plaintiff. Having exhausted the tortfeasor's policy limits, Plaintiff filed for UIM benefits against Liberty and Progressive. The Liberty policy provided UIM

benefits with limits of $25,000 per person/ $50,000 per accident, while the Progressive policy provided UIM benefits with limits of $15,000 per person/ $30,000 per accident.

Progressive filed a Motion for Summary Judgment arguing that because the UIM coverage in the Progressive policy had the same limits as the tortfeasor's liability coverage, by definition, the tortfeasor was not underinsured and Plaintiff could not recover UIM coverage from Progressive. On August 23, 2006, the Court issued a decision stating:

> [t]he UIM limits of Ms. Garnett's personal policy were in the amount of $25,000 per person and $50,000 per accident. These amounts are greater than the $15,000 per person and $30,000 per accident liability coverage amounts of the tortfeasor. Therefore, UIM coverage for Ms. Garnett is triggered. Once the threshold determination is made that Ms. Garnett qualifies for UIM coverage by looking to 'any one' policy, she may 'stack' the vehicle policy onto the amounts of her personal policy and access the coverage amounts in both policies.[1]

Subsequently, Defendants settled Plaintiff's claims for UIM benefits. The remaining issue before the Court is the priority among the two UIM policies.

CONTENTIONS OF THE PARTIES

In support of its Motion in Limine, Progressive argues that Liberty should be deemed the primary carrier for two reasons: 1) the policy language in the two insurance contracts places the obligation of primary coverage on

[1] The Court did not reach the issue of which policy is primary. *See Garnett v. Liberty Mut. Fire Ins.,* 2006 WL 2441969 (Del. Super.) (citing *Deptula v. Horace Mann Ins. Co*., 842 A.2d 1235 (Del. 2004)).

Liberty, and 2) equitable considerations require Liberty to act as the primary carrier.

Progressive contends that the unambiguous language of the policies leaves Liberty as the primary carrier in this case. The relevant provision in Progressive's policy of insurance provides:

> If there is other applicable uninsured or underinsured motorist coverage, we will pay only our share of the damages. Our share is the proportion that our limit of liability bears to the total of all available coverage limits. *Any insurance we provide shall be excess over any other uninsured or underinsured motorist coverage, except for bodily injuries to you or a relative when occupying a covered vehicle.* (Emphasis added).[2]

Liberty's policy provides in relevant part:

> *Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing coverage on a primary basis.*
> If the coverage under this policy is provided…[o]n a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on a primary basis. (Emphasis added).[3]

Thus, Progressive's policy provides that it shall be excess over *any other UIM coverage*, while Liberty's policy provides that it is excess only to *any other policy providing primary coverage.* Progressive argues, therefore, that

[2] Def. Op. Brief, Ex. A, Progressive Insurance Policy, at 25; Progressive defines "relative" as "a person residing in the same household as you and related to you."[2] It is undisputed that at the time of the incident, Plaintiff was not living with Progressive's insured, and is therefore, not a relative under the terms of the contract. Liberty concedes that Plaintiff was not a "relative" of Richard Garnett. That point is, therefore, not at issue in this motion.

[3] Def. Op. Brief, Ex. C, Liberty Mutual Insurance Policy, at 3.

since there was no valid primary policy, Liberty's own policy language leaves Liberty as the primary carrier.

In response, Liberty contends that its UIM policy would only be primary if it was the insurer of the vehicle. Liberty argues that as the insurer of the vehicle, Progressive is primary while Liberty is secondary.

Progressive alternatively argues that equitable considerations require Liberty to act as the primary policy in this case. Specifically, Progressive contends that because Liberty's policy triggered the UIM coverage for both carriers, equity mandates that Liberty's policy be the primary for this loss which it anticipated and triggered with its coverage. According to Progressive, both Progressive and its insured expected that the policy would not cover UIM benefits where, as in this case, the tortfeasor's policy limits equal the limits of the Progressive policy.[4] Plaintiff's policy with Liberty, on the other hand, has a limit exceeding that of the tortfeasor's limits. Therefore, Progressive argues that Liberty and its insured anticipated that Liberty would pay UIM benefits when the insured is involved in an accident with a tortfeasor with a $15,000 per person policy limit, which is less than Liberty's $25,000 per person limit. Because Liberty arguably had reason to

[4] Because Progressive's policy limits are equal to the tortfeasor's limits, coverage for UIM benefits was not triggered by Progressive's policy. However, Plaintiff's personal auto insurance policy with Liberty has a limit of $25,000/$50,000 in UIM benefits, which exceeds the tortfeasor's limits and triggers UIM benefits.

anticipate such a payout, Progressive asks this Court the find Liberty as the primary carrier.

ANALYSIS

The Delaware Motor Vehicle Financial Responsibility Law mandates a system of insurance for the protection of and compensation to people injured in automobile accidents.[5] 21 *Del. C.* §2218(a) provides that "[n]o owner of a motor vehicle registered in this State… shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle…" 21 *Del. C.* §2902(b)(2) provides that "[s]uch owner's policy of liability insurance shall…insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law…"

In *State Farm Mut. Auto. Ins. Co. v. Clarendon National Insurance Co.,*[6] the Delaware Supreme Court considered the construction of 21 *Del. C.* §2218(a) and 21 *Del. C.* §2902(b)(2). *Clarendon* involved an insurance coverage dispute between the tortfeasor's personal automobile insurer and the insurer of the vehicle operated by the tortfeasor at the time of the collision. In determining which insurance policy had the primary obligation

[5] *State Farm Mut. Auto. Ins. Co. v. Wagamon,* 541 A.2d 557, 560 (Del. 1988).
[6] 604 A.2d 384 (Del. 1992).

to defend and indemnify the tortfeasor, the Supreme Court looked to underlying public policy and the purpose of the insurance statutes. The Court construed 21 *Del. C*. §2218(a) and §2902(b)(2) to mean that "motor vehicles registered in Delaware must be insured against legal liability up to the stated limits for the benefit of the named insured and any person operating the vehicle with the permission of the insured."[7] Moreover, the Court held that reading the two sections in *pari materia* can only lead to the conclusion that Delaware public policy "places the obligation of providing primary insurance coverage upon the policy of the vehicle's owner."[8]

This Court reached a similar conclusion, in *Masten v. Nationwide Mutual Ins. Co*.,[9] holding that the vehicle's insurer had the obligation to provide primary coverage of UIM benefits. *Masten* involved a plaintiff who was injured in a vehicular collision while driving a loaned vehicle. After exhausting the tortfeasor's liability coverage, U.S.F. & G., the vehicle's insurer, settled plaintiff's UIM claim against it for $60,000, which was less than the UIM coverage limits under the policy.[10] Subsequently, Nationwide, plaintiff's personal auto insurer, refused plaintiff's UIM claim, on the basis that U.S.F. & G's UIM coverage was primary and must be exhausted before

[7] *Clarendon*, 604 A.2d at 388 (citing *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557 (Del. 1988)).
[8] *Id.*
[9] 1993 WL 19651 (Del. Super.).
[10] *Id.*

plaintiff could seek excess coverage under Nationwide. The Court was asked to determine which policy would be primary when two policies could be "stacked" for UIM coverage purposes. The Court held that "[UIM] coverage which covers the owner of the vehicle is primary as to plaintiff's damages in excess of the tortfeasor's liability insurance."[11] Stated otherwise, "as between the UIM on the vehicle versus the UIM which is personal to the plaintiff, the UIM coverage on the vehicle is primary."[12] Therefore, the Court found the insured was required to seek UIM recovery from the policy covering the rental car before seeking recovery from her own policy and was ineligible to claim UIM benefits from Nationwide until she had exhausted the U.S.F. & G limits. [13]

Progressive argues that the usual rule regarding which insurer should provide primary coverage is changed when a policy other than the vehicle policy triggers the claimant's access to UIM coverage. The Supreme Court has held that claimants may look to "any one policy" when determining the threshold question of whether they qualify for UIM coverage.[14] Once that determination is made, the claimant may "stack" other policies and access

[11] *Id.* at *3 (quoting *Urell v. Pennewell*, Del. Super., C.A. 87C-AP-41, Martin, J. (Ma 31, 1988)).
[12] *Id.*(citing *Krutz v. Harlesyville Mut. Ins. Co*., 766 F.Supp. 219 (D. Del. 1991)).
[13] *Id*.
[14] *Deptula v. Horace Mann Ins. Co*., 842 A.2d 1235 (Del. 2004).

the coverage amounts in all of them.[15] Nothing in the current decisional law requires or even suggests that the policy which triggers UIM coverage must be the primary policy for payment purposes. There is, however, substantial case law holding that the insurer of the vehicle is primary over the carrier which insures the individual in a variety of fact scenarios.[16]

In accordance with settled Delaware law and consistent with established public policy, this Court finds that Progressive, as the insurer of the vehicle, is the primary insurance carrier. As previously stated, the public policy of this state "places primary financial responsibility to provide insurance coverage on the vehicle's owner" and any policy language that contravenes this public policy is void.[17] The language of the provision in Progressive's policy, unambiguous as it may be, contravenes public policy by attempting to avoid primary coverage even in situations where, as here, Progressive is the vehicle's insurer. The Court, therefore, finds Progressive's policy language contravenes the public policy reflected in Delaware's Motor Vehicle Financial Responsibility Law and is void. Consequently, Progressive, as the insurer of the vehicle, is obligated to provide primary insurance coverage to Plaintiff.

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[15] *Id. at* 1238.
[16] *See State Farm Mut. Auto. Ins. Co. v. Clarendon National Insurance Co.,* 604 A.2d 384 (Del. 1992); *Masten v. Nationwide Mutual Ins. Co.,* 604 A.2d 384 (Del. 1992); *Urell v. Pennewell*, Del. Super., C.A. 87C-AP-41, Martin, J. (Ma 31, 1988); *Carrington v. Assurance Co. of America, Inc.,*1998 WL 733757, *2 (Del. Super.); *Krutz v. Harleysville Mut. Ins. Co.,* 766 F.Supp. 219 (D.Del.1991).
[17] *State Farm Mut. Auto. Ins. Co. v. Clarendon National Insurance Co.,* 604 A.2d 384, 391 (Del. 1992).

The Court next addresses Progressive's argument that equity requires that Liberty's policy be the primary source of compensation. In the instant case, while it is true that Progressive's policy, alone, would not have triggered UIM coverage ,[18] once the Liberty policy triggered UIM benefits, Plaintiff could access both policies. The order of payment by each insurer is established by public policy, which mandates that the insurer of the vehicle is the primary payor. Both the language of the relevant statutes and the public policy supporting them dictate that the primary policy is that of the vehicle. Accordingly, the Court finds this contention unpersuasive.

CONCLUSION

For the reasons stated, the Court concludes that Progressive, as the insurer of the vehicle, is the primary carrier.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[18] *Id.* ("To qualify as an underinsured motor vehicle, the limits of bodily injury coverage available to the tortfeasor must be less than the limits provided by the claimant's underinsured motorist coverage.").